IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD ROBERT BURRILL, Appellant, v. THE STATE OF WASHINGTON; THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES; ANNA BAKER, individually and in her official capacity; HELEN EYSSEN, individually and in her official capacity; ENUMCLAW POLICE DEPARTMENT; and DETECTIVE KIM PIPPEN, individually and in his official capacity, Respondents.	)	No. 56612-1-I DIVISION ONE UNPUBLISHED FILED: August 14, 2006

COX, J. – A caseworker may be legally responsible for a parent's separation from a child that is imposed by court order if the caseworker deprives the court of a material fact due to a faulty investigation.[1] But where the information before the court in making its order to separate a child from a parent demonstrates that reasonable minds would not differ that the court had all material information before it, the court's order is a superseding cause, there

[1] Tyner v. Dep't of Social and Health Services, 141 Wn.2d 68, 83-84, 1 P.3d 1148 (2000).

being no proximate cause linking the caseworker's actions and the alleged harm.[2] A police officer is entitled to dismissal upon establishing the defense of qualified immunity.[3] Here, there are no genuine issues of material fact that the trial court orders were superseding causes and thus there is no proximate cause linking the caseworker's alleged acts to the claimed harm. Moreover, there is no genuine issue of material fact respecting either the defense of qualified immunity for the officer or the claim of malice against that officer. We affirm the summary dismissal of all claims.

During the course of dissolution proceedings between Cynthia and Donald Burrill, their four-year-old daughter, A.B., alleged that her father sexually abused her. Child Protective Services and police authorities responded to the report, and both initiated investigations. A family law commissioner entered a temporary protection order based on Cynthia Burrill's petition, and that order was extended either by agreement of the parties or by action of the court pending the CPS investigation. Separately, based on the police investigation and referral to the prosecutor, the State filed criminal charges against Donald Burrill based on the allegations of A.B. The criminal court entered a criminal no-contact order, prohibiting Donald Burrill from having contact with A.B.

Months after entry, both the civil protection and criminal no-contact orders were terminated. Thereafter, Burrill commenced this action against the State of

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[2] Id. at 86.

[3] Estate of Lee v. City of Spokane, 101 Wn. App. 158, 176, 2 P.3d 979 (2000).

Washington, the Department of Social and Health Services (DSHS), Anna Baker (social worker), Baker's supervisor, Helen Eyssen, the Enumclaw Police Department, and Detective Kim Pippin.[4] Burrill claims that the negligent investigations of Baker and Detective Pippin gave rise to his claims of malicious interference with the parent-child relationship, alienation of affection, negligence, and claims for violations of his constitutional rights.

The State moved for summary judgment, which the trial court denied. Based on additional material, the State made a second summary judgment motion, which the court granted based on its determination that there was no proximate cause for the claims.

Detective Pippin also moved for summary judgment. The trial court granted the motion, concluding as a matter of law that Detective Pippin is entitled to common law qualified immunity and the record lacked evidence of either harmful placement or malice.

Burrill appeals.

NEGLIGENT INVESTIGATION

Burrill argues that the trial court erred in granting the State's second summary judgment motion by concluding that there was no proximate cause. Burrill further argues that the trial court erred in granting summary judgment to Detective Pippin on the basis of qualified immunity and on other grounds. We

[4] For clarity we will refer to the respondents as "the State." Detective Pippin will be referred to separately. The Enumclaw Police Department is not a party to this appeal.

disagree.

A motion for summary judgment may be granted when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[5] A material fact is one on which the outcome of the litigation depends.[6] We review a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[7]

RCW 26.44.050 creates a statutorily mandated duty of DSHS and law enforcement to investigate reports of child abuse.[8] RCW 26.44.050 provides in pertinent part:

> Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A negligent investigation claim is available to a parent or child only when there is a biased or faulty investigation that leads to a harmful placement decision.[9] In order to prevail, the claimant must prove that the allegedly faulty

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[5]CR 56(c).

[6] Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

[7] Khung Thi Lam v. Global Med. Sys., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

[8] Tyner, 141 Wn.2d at 77.

[9] M.W. v. Dep't of Social and Health Services, 149 Wn.2d 589, 591, 595, 70 P.3d 954 (2003).

investigation was the proximate cause of the harmful placement.[10]

Proximate cause requires two elements: cause in fact and legal causation.[11] Cause in fact is a question for the jury, which asks "but for" the defendant's actions, would the plaintiff have been injured.[12] Legal causation is generally a question for the court, and its inquiry depends on "mixed considerations of logic, common sense, justice, policy, and precedent."[13]

A judge's no-contact order will act as a superseding cause, breaking the causal chain, cutting off the State's liability for negligent investigation, "only if all material information has been presented to the court and reasonable minds could not differ as to this question."[14] Materiality is a question of cause in fact and is typically a question for the jury unless reasonable minds could reach but one conclusion.[15]

The State

In support of the State's second summary judgment motion, it provided three reports of proceedings from hearings where the civil protection orders

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[10] Petcu v. State, 121 Wn. App. 36, 56, 86 P.3d 1234, review denied, 152 Wn.2d 1033 (2004).

[11] Tyner, 141 Wn.2d at 82.

[12] Id.

[13] Id. (quoting Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998)); Petcu, 121 Wn. App. at 56.

[14] Tyner, 141 Wn.2d at 86, 88.

[15] Id. at 86.

were extended by the court: November 22, 2000, December 6, 2000, and December 22, 2000. Each of these proceedings shows on what the court relied in extending the temporary protection order. Based in part on these materials, the trial court concluded that the State was not the proximate cause of the claimed harm.

On October 23, 2000, Cynthia Burrill filed a petition for an order of protection requesting that Burrill have no contact with their daughters, A.B. and E.B. The petition was based on Cynthia Burrill's own allegations that A.B. told her she was sexually abused, and other unrelated allegations. CPS had no contact or input with the court at this time. The court granted the temporary protection order (TPO), prohibiting Burrill from having contact with his two daughters.

On November 1, 2000, at Cynthia Burrill's request, Baker wrote a letter to the court requesting a continuance on the grounds that Cynthia Burrill's legal counsel was unavailable. Baker's letter also stated that there is "an open CPS case which is pending investigation, and that it is imperative that contact not be allowed between the father and the other members of the family, including the mother and two daughters, to continue until further notice." Even if the court received Baker's letter, it had no effect on the court. That is because the parties agreed to continue the protection order on November 6.

On November 22, counsel informed the court that there was a pending CPS investigation and criminal investigation. There was no reference made to

Baker's November 1 letter. The court refrained from making a finding on the merits and extended the TPO to be reviewed on a two week basis. At that time, the court did not rely on any information from CPS in granting a continuance and stated:

> I don't have anything written from CPS that says what they want to happen in this case. I don't have their recommendations at all. I have nothing from them at this juncture.[16]

On December 5, 2000, Baker wrote a letter stating that there was then an open and pending CPS investigation and recommending a continuance of no contact between Burrill and his children.

On December 6, a court commissioner had Baker's December 5 letter, Nicole Farrell's report of her interview with A.B., the Harborview Sexual Assault Report, and knowledge of the criminal investigation. The commissioner refrained from making a determination on the merits until receipt of a final report from Baker and continued the matter for 30 days.

On December 20, the prosecutor filed a charge of Rape of a Child in the First Degree against Burrill, and the court found probable cause for an arrest warrant.

On December 22, at a revision hearing before a superior court judge, the court was aware the criminal investigation was complete, but was unaware that the prosecutor had filed charges. The court continued the civil protection order, stating that if the prosecutor filed a case, the court would include a no-contact

[16] Clerk's Papers at 1225.

order in the criminal proceedings. At the summary judgment hearing in this case, the court noted that the judge hearing the revision motion relied solely on the outcome of the prospective charging decision to deny the revision, not on any information from CPS.

On December 26, Baker completed her investigation determining that the allegations of sexual abuse were "founded" and recommending that if visitation were permitted, it should be supervised. The following day, Baker completed a summary assessment of the case. She sent both reports to the court and closed the case.

Burrill challenges Baker's report, asserting that it misreads Dr. Sugar's findings. It does not, and the court had Dr. Sugar's sexual assault report before it. Baker's report found digital penetration based on A.B.'s clear report of digital vaginal contact by her father.

On January 2, 2001, the court entered the criminal no-contact order, prohibiting Burrill from having any contact with A.B. and E.B., except with CPS approved supervision. On January 5, after the court received Baker's report, it extended the civil protection order, prohibiting Burrill from having contact with A.B., and permitting Burrill supervised visits with E.B.

This record shows that the court did not rely on information from CPS in continuing the protection orders. Moreover, the criminal no-contact order was already entered by the time the court had CPS's reports. Thus, the criminal no-contact order is a superseding cause that cuts off any alleged liability of the

State.

Burrill relies on Tyner v. DSHS[17] to argue that the protection orders are not a superseding cause because CPS did not provide all material information to the court. Tyner III is distinguishable.

In that case, CPS filed a dependency petition pursuant to allegations that David Tyner sexually abused his four-year-old son.[18] Tyner was ordered to have no-contact with his two children. After the no-contact orders ended, Tyner filed a claim for negligent investigation against the State.[19] The CPS caseworker concluded that the allegations against Tyner were "unfounded," but failed to report this to the court or the other parties.[20] The caseworker also failed to interview collateral sources, as requested by Tyner that would have provided exculpatory information.[21] A jury returned a verdict in favor of Tyner.

The court of appeals reversed, holding that the information withheld from the court was not material and the no-contact orders were a superseding intervening cause.[22] The Washington Supreme Court reversed the court of appeals, holding that a jury could have determined that the withheld information

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[17] 141 Wn.2d 68.

[18] Id. at 72, 74.

[19] Id. at 76.

[20] Id. at 74, 87.

[21] Id. at 73-74, 87.

[22] Id. at 76.

was material and was the cause in fact of Tyner's separation from his children.[23]

Here, the civil protection order was obtained by Cynthia Burrill without any input to the court from CPS. CPS never filed a dependency petition. The December 5 letter by Baker and her December 26 and December 27 reports were the only communications before the court. Also, unlike the caseworker in Tyner, Baker reported all of her findings to the court. Burrill never requested that Baker interview collateral sources that would provide exculpatory information. The record does not support Burrill's assertion that Baker failed to provide all material information to the court. The record does show that the court did not rely on CPS in granting the protection orders, and the criminal no-contact order is a superseding cause.

Finally, Burrill asserts that the criminal no-contact order is not a superseding cause because it expired in March 2001, and the civil protection order was in place until July 2001. However, Burrill made no motion to terminate or alter the civil protection order prior to July. The criminal no-contact order was a superseding cause.

We hold that the trial court properly granted summary judgment to the State.

Detective Pippin

Next, Burrill argues that the trial court erred in concluding that Detective Pippin is entitled to qualified immunity and granting his motion for summary

[23] Id. at 87-89.

judgment. We disagree.

Police officers are entitled to common law qualified immunity from state tort claims if their conduct meets a three-prong test: (1) they carry out their statutory duty; (2) according to the procedures dictated by statute and superiors; and (3) they act reasonably.[24] Qualified immunity protects officers only for acts

[24] Estate of Lee, 101 Wn. App. at 176.

that are done in good faith.[25]

The purpose of qualified immunity is to protect government officials from the necessity of defending a suit, and "insubstantial claims [should] be resolved as quickly as possible."[26] Entitlement to qualified immunity may be established as a matter of law.[27] "The standard is one of objective legal reasonableness, that is, whether the officer acted reasonably under settled law under the circumstances, not whether another reasonable, or more reasonable interpretation of events can be constructed after the fact."[28]

It is undisputed that Detective Pippin had a statutory duty under RCW 26.44 to investigate the child abuse allegations referred to him by CPS.[29] He also had a statutory duty to refer his investigation to the prosecutor's office upon completion of his investigation.[30] Detective Pippin complied with these statutory duties in conformance with police procedures.

Burrill argues that the third prong of the test is not met because Detective Pippin failed to act reasonably in conducting his investigation. He further

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[25] Musso-Escude v. Edwards, 101 Wn. App. 560, 568, 4 P.3d 151 (2000).

[26] Estate of Lee, 101 Wn. App. at 177 (quoting Orwick v. Fox, 65 Wn. App. 71, 83-84, 828 P.2d 12 (1992)).

[27] Id. at 177; Dang v. Ehredt, 95 Wn. App. 670, 680, 977 P.2d 29 (1999).

[28] Dang, 95 Wn. App. at 679.

[29] RCW 26.44.050.

[30] RCW 26.44.030.

asserts that reasonableness is a question for the jury.[31] However, if reasonable minds could reach but one conclusion, a question of fact may be determined as a matter of law.[32]

Burrill contends that Detective Pippin did not act reasonably because he was passive in conducting his investigation and did not personally interview A.B. He further argues that Detective Pippin assumed the abuse was taking place and did not consider all of the evidence.

The record does not support this assertion. The record shows that Detective Pippin thoroughly investigated A.B.'s allegations. After receiving the CPS referral, Detective Pippin immediately contacted Anna Baker. Detective Pippin also initiated contact with Burrill, explained the allegations reported to CPS, and advised him that he should not have contact with either of his daughters until he heard from him or the court. Detective Pippin also requested a written statement from Burrill, but he declined.

Pursuant to procedures, Detective Pippin arranged for the prosecutor's child interview specialist, Nicole Farrell, to interview A.B. Detective Pippin observed Farrell interview both A.B. and E.B. separately regarding the allegations. He did not participate in the interview, but witnessed A.B. tell Farrell

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[31] Appellant's Brief at 32 (citing Dunning v. Paccerelli, 63 Wn. App. 232, 240-41, 818 P.2d 34 (1991) (holding that summary judgment was not proper because there were issues of fact whether the caseworkers acted in good faith in conducting the sexual abuse investigation and also whether they followed procedures).

[32] Tyner, 141 Wn.2d at 86.

that her dad "put his fingers in my pee pee . . . mostly in my bed."

Detective Pippin also reviewed Dr. Sugar's report from A.B.'s medical exam. Dr. Sugar's report included A.B.'s statements regarding her dad "putting his pinky in her pee pee." The report concluded that there were no visible signs of trauma to A.B.'s vagina, but stated that this did not rule out sexual assault.

Nothing in the record suggests Detective Pippin acted unreasonably in conducting his investigation or that he acted in bad faith. Rather, the record shows that he followed procedures by having A.B. interviewed by a child specialist and reviewing Dr. Sugar's medical report. He also received A.B.'s medical records, obtained a written statement from Cynthia Burrill, and requested a statement from Donald Burrill.

A.B. repeatedly alleged that her father had sexually abused her. Detective Pippin reported these allegations and also reported that the Burrills were going through a heated divorce. Detective Pippin had a duty to investigate the child abuse allegations and did so in a reasonable and proper matter. Reasonable minds could not differ that Detective Pippin acted reasonably. Thus, the trial court properly concluded that Detective Pippin is entitled to qualified immunity and dismissal from the action.

MALICE

Burrill argues that the trial court erred in concluding that the record lacked evidence of malice. We disagree.

A claim of malicious interference with a parent-child relationship or

alienation of affection requires five elements: (1) an existing family relationship; (2) a malicious interference with the relationship by a third person; (3) an intention on the part of the third person that such malicious interference results in a loss of affection or family association; (4) a causal connection between the third parties' conduct and the loss of affection; and (5) resulting damage.[33] Malice is "an intent that [the parent] lose the affections of [the] children."[34] Probable cause is a complete defense to malicious prosecution.[35]

Here, Burrill filed claims of malicious interference with a parent-child relationship and alienation of affection against Detective Pippin. The trial court found that the record lacked any evidence of malice. Importantly, the trial court found there was probable cause to criminally charge Burrill. That is a complete defense to this claim.

We affirm the summary judgment orders and the order denying the motion for reconsideration.

Cox, J.

WE CONCUR:

[33] Babcock v. State, 112 Wn.2d 83, 107-08, 768 P.2d 481 (1989).

[34] Waller v. State, 64 Wn. App. 318, 339, 824 P.2d 1225 (1992).

[35] Hanson v. Snohomish, 121 Wn.2d 552, 563, 852 P.2d 295 (1993).